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No. 102

In the Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS R. POWERS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on February 1, 1938, affirming the decree of the United States District Court for the District of Montana, as modified.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 586–591) is reported in 94 F. (2d) 783. The opinion of the trial court (R. 253–277) is reported in 16 F. Supp. 155.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on February 1, 1938 (R. 591). Petitioner filed a petition for rehearing which was denied on March 8, 1938 (R. 591–592). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether waters, impliedly reserved by the Treaty of May 7, 1868, for the purpose of irrigating the lands of the Crow Indian Reservation, were reserved to the individual Indians of the tribe rather than to the tribe for the benefit of its people as is the case with Indian property generally—even though the lands were admittedly and expressly held in tribal ownership under the treaty, and nothing in the treaty implied otherwise as to waters.

2. Whether all the owners of lands within an Indian reservation are indispensable parties to a suit by the United States to enjoin certain landowners within the reservation from unlawfully diverting waters reserved for the irrigation of tribal lands—where (1) the defendants are wholly without right to divert waters from the stream without the consent of the Secretary of the Interior; (2) the diversion by the defendants interferes with the operation of a reclamation project constructed and

maintained on the reservation for the benefit of the Indian tribe by the Secretary of the Interior pursuant to specific Acts of Congress; and (3) the absence of other landowners can neither harm the defendants (who may advance every pertinent defense to the suit, and under any decree could be subject to no liability to other landowners) nor prejudice such other landowners (who would not be subject to the decree sought, and whose supply of water would not be diminished if it were granted).

TREATY AND STATUTES INVOLVED

The pertinent parts of the Treaty of May 7, 1868 (15 Stat. 649), creating the Crow Indian Reservation; of the Act of April 11, 1882 (22 Stat. 42), providing for the allotment of Crow Reservation land; of the Act of February 8, 1887 (24 Stat. 388), commonly referred to as the General Allotment Act; and of the Act of March 3, 1891 (26 Stat. 1040), authorizing the construction of the Crow Irrigation Project system and making funds available therefor, are set forth in the Appendix, *infra*.

STATEMENT

In June 1934, the United States instituted this suit in the District Court for the District of Montana, Billings Division, against certain owners of land within the Crow Indian Reservation to enjoin them from diverting the waters of the Little Big Horn River, Lodge Grass Creek, and their tributaries, within the Crow Indian Reservation

(R. 2–29, 40). Both courts below held that th Government was not entitled to the relief sough (R. 317–319, 591). The facts essential to an un derstanding of the case, are as follows:

1. *Treaty of 1868.*—The Treaty of May 7, 186 *infra,* setting aside certain lands for the Crow In dian Reservation, provided that any member o the tribe, being the head of a family, who desire to commence farming "shall have the privilege t select * * * a tract of land within said res ervation, not exceeding 320 acres in extent, whic tract * * * shall cease to be held in common but the same may be occupied and held in the exclu sive possession of the person selecting it, and of hi family, so long as he or they may continue to culti vate it." Members of the tribe, not heads o families, were given the right to select a tract of 8 acres. Those who commenced farming were en titled to receive "seed and agricultural imple ments" for the first four years, as well as instruc tions from a Government farmer. The treaty wa silent as to any rights to use the waters borderin on or flowing through the reservation.

2. *The Reclamation Project.*—More than 63,00 acres of land within the reservation were suitabl for farming if waters could be made available fo their irrigation (R. 6–7, 46, 106, 136, 353, 357). Ac cordingly, before 1885, the Government commence the construction of irrigation works to divert th waters of the Little Big Horn River and Lodg Grass Creek, which flowed through the reservation

for use upon the lands (R. 9–10, 327–333, 335, 337, 343).

The General Allotment Act of 1887 (24 Stat. 388), provided—

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

A few years later the United States and the Crow Tribe entered into an agreement whereby certain lands within the reservation were ceded to the Government, and in consideration therefor the Secretary of the Interior was authorized to expend $275,000 in the construction, maintenance and management of a comprehensive irrigation system. Act of March 3, 1891 (c. 543, 26 Stat. 1040). Thereafter, additional funds were made available for this purpose, out of "the annuity money due or to become due said Indians" (30 Stat. 947; 31 Stat. 247) or from funds due in consideration of further land cessions (33 Stat. 357). Under such authorization, from 1893 to 1915, six ditches were constructed at a cost of almost two million dollars with a sufficient carrying capacity to irrigate more than 23,000 acres within the reach of the project (R. 334, 335, 337–341, 349, 350–353, 357, 380).

3. *Allotments to Defendants' Predecessors.*—Commencing in the year 1901, allotments in severalty of various sized tracts abutting or adjacent to the Little Big Horn River or Lodge Grass Creek within the reservation were made to the defendants' predecessors pursuant to the Act of April 11, 1882 (22 Stat. 42) and the Act of February 8, 1887 (24 Stat. 388). These allotments finally culminated in the issuance of fee simple patents issued as provided in the Act of May 8, 1906 (34 Stat. 182; R. 325, 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). The defendants have succeeded to the interest of the original allottees either by mesne conveyances or by purchase at Government sales of deceased allottees' lands (R. 308). None of the deeds or patents under which they claim title contain any express provision as to water rights but merely purport to convey the land "together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" (R. 460, 308). None of defendants' lands are within the area irrigable by the Government project described above (R. 15, 17–26, 55–57, 114, 144) but, from the time that patents were issued,[1] have been irrigated by

[1] The trial court found that "the Peters ditch, owned by the defendants Dethlefsen, was begun and completed in 1896 and water was diverted through it to the lands of the Peters family, now owned by the defendants Dethlefsen, in the year 1896." No allotments were made, however, to members of the Peters family until 1901 to 1907, and patents were not issued until 1918 to 1923 (R. 154–155, 172–173, 460–468).

water diverted from the Little Big Horn River and Lodge Grass Creek and their tributaries through privately owned ditches (R. 308–309, 357–360).

4. *Present Suit Filed.*—By reason of drought during the years 1931 to 1934 and the diversion of waters upstream from the Government project by the defendants there was not sufficient water available to irrigate successfully the 8,000 acres being farmed under the Government project (R. 403, 433, 502–503) and in 1934 conditions became so acute that serious crop losses were suffered—in many cases the crops being totally abandoned (R. 357, 396–398, 403, 407, 410, 415, 418, 422, 423, 425, 427, 429–433, 434, 502, 503). Accordingly this suit was filed to enjoin the defendants from diverting the waters of the Little Big Horn and Lodge Grass Creek and thus to make available all the waters of those streams necessary for the irrigation of lands within the Government project (R. 26–28).

In their answers, the defendants alleged that as successors to Indian allottees they were entitled to divert as much water as they might need for irrigating their lands and "for stock, domestic and any other beneficial purposes," or one-half of one miner's inch of water per acre at the point of delivery (R. 64, 70, 75, 81, 86, 87, 90, 92, 95, 97, 120, 150, 157). As a further defense, they also alleged that other persons were diverting waters upstream from the Government project under rights similar to theirs and "that there cannot be any complete adjudication as to water rights in said river,

creek, and their tributaries without joining all of said persons as parties defendant herein" (R. 116-117, 146–147). A motion to require the plaintiff to make these persons parties defendant (R. 163–165) was denied (R. 221), as was an offer to prove the extent of their diversions (R. 439).

The trial court concluded, merely from the fact that lumber for a headgate on a ditch built by a predecessor of one of the defendants "was furnished by the irrigating outfit at Crow Agency" (R. 477), that the appropriation of water by these defendants was "known to, sanctioned by and acquiesced in by the Secretary of the Interior and the Commissioner of Indian Affairs" (R. 309–310), although the evidence at the trial was that none of the defendants or their predecessors had been authorized by the Secretary of the Interior or any of his subordinates to construct ditches or divert waters from either stream (R. 358–360, 500).

5. *The Decree of the Trial Court.*—The trial court concluded as a matter of law that by the Treaty of 1868, there was reserved, for the benefit of each individual Indian, "and not for the Crow Tribe of Indians * * * sufficient water to irrigate his irrigable land to the extent of forty acres" the right to which became vested upon the issuance of patents with a priority as of May 7, 1868 (R. 313–314). The court also concluded (R. 315):

> The attempt of plaintiff to make and enforce regulations granting to certain members of the Crow Tribe of Indians the right

> to use the waters of said river, creek, and their tributaries to the exclusion of other members is an usurpation of power and illegal.

Accordingly, although the bill required no affirmative determination of the amount of water the respective parties were entitled to receive, a decree was entered dismissing it and awarding "each of said answering defendants" one-half miner's inch of water per acre at the point of delivery, and decreeing that "in case of shortage of water, each acre irrigable from said streams, or any of them, is entitled to its prorata share of the available water therefrom, whether such land is under a government ditch or not" (R. 317–319).

6. *The Decree of the Court Below.*—Upon appeal by the Government, the court below also held that the waters were reserved by the treaty for the benefit of the individual Indians and not for the tribe and that therefore the Secretary of the Interior was not authorized (R. 590)—

> to deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of said waters.
>
> * * * * *
>
> The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case.

The court then held, however, that the trial court erred insofar as it attempted to determine the

rights of the defendants because "such a determination would directly and materially affect all owners of lands within the reservation, many of whom are not parties to this suit" (R. 590). Accordingly a decree was entered, which reads as follows (R. 591):

> The decree [of the trial court] is modified by striking therefrom so much thereof as purports to grant affirmative relief to defendants, and by incorporating in said decree an order dismissing without prejudice the counterclaim of appellees Yates and Dethlefsen together with an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice. As so modified, the decree is affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the waters of the Little Big Horn River and Lodge Grass Creek, and their tributaries, were reserved by the Treaty of May 7, 1868, for the benefit of individual Indians and not for the common benefit of the Crow Tribe.

2. In failing to hold that the United States, as guardian of the Crow Tribe and its members, may control and has exercised control over the waters within the Crow Reservation needful for the irrigation of the land therein.

3. In holding that the Secretary of the Interior was not authorized to prevent any allottee or

patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee from diverting the waters of the Little Big Horn River and Lodge Grass Creek.

4. In failing to enjoin the defendants, whose lands are not included in an irrigation project constructed, maintained and managed by the Secretary of the Interior, from diverting waters necessary for the irrigation of lands under the system.

5. In holding that all of the owners of lands within the reservation are necessary parties to this suit.

6. In holding that "The District Court was right in holding that appellant was not entitled to an injunction, or to any relief in this case."

7. In modifying the decree of the trial court by incorporating therein "an order denying plaintiff's application for an injunction and dismissing its bill of complaint, without prejudice" and in affirming the decree of the trial court as modified.

8. In failing to reverse the decree of the trial court and to order an injunction to issue as prayed for in the bill of complaint.

REASONS FOR GRANTING THE WRIT

In affirming the trial court's holding that the Treaty of May 7, 1868, creating the Crow Indian Reservation impliedly reserved waters for irrigating reservation lands but that it reserved them to the individual Indians of the tribe and not to the Indian tribe for the benefit of its people, the court

below passed upon an important question of Federal law which has not been but should be settled by this Court. The decision, moreover, appears to be erroneous in view of previous decisions of this Court.

I

Waters Reserved by the Treaty Are Tribal Property

When land was set apart for the Crow Indian Reservation by the Treaty of May 7, 1868, *infra*, no mention was made of waters within the borders of the reservation. It has long been settled, however, that under such a treaty the waters bordering on or flowing through the reservation are impliedly reserved by the Indians in a sufficient amount to supply their needs, including the irrigation of their lands. *Winters* v. *United States*, 207 U. S. 564, 567–577. The problem here presented by the decisions below is whether this implied reservation was for the benefit of the tribe or for the individual members thereof. It is the position of the Government that the waters were reserved for the benefit of the tribe in common and not for the benefit of any individual Indian.[3]

It is clearly established that, prior to some division or allotment in severalty, Indian lands and property are held by the tribe in common owner-

[3] The Government is not stressing any claim made below of ownership of these waters by the United States, except as guardian of the Indians and their tribal property, since whether the fee is in the Indians or the United States is immaterial with reference to the relief sought.

ship. *The Cherokee Trust Funds,* 117 U. S. 288, 308; *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294. In the *Hitchcock* case, this Court said (p. 307):

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, * * *.
>
> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

As stated with reference to the property of the Cherokee tribe in *The Cherokee Trust Funds* case, *supra* (p. 309):

> All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

No reason appears why, in the case of water, the established principle that tribal property is owned in common should be departed from and a novel doctrine laid down that waters are reserved for individual Indians. Previous cases establish no authority for such a departure from the usual rule. On the contrary, while the point was not expressly decided in *Winters* v. *United States,* 207 U. S. 564, it is clear that when the Court there decided that the waters were impliedly reserved for the Indians it meant the Indian tribes and not the individual Indians, since, as is apparent

from the bill of complaint in that case (pp. 565-567), the United States was proceeding on behalf of the several Indian tribes and not on behalf of individual Indians. Nor do *Skeem* v. *United States*, 273 Fed. 93 (C. C. A. 9th), and *Conrad Inv. Co.* v. *United States*, 161 Fed. 829 (C. C. A. 9th), cited by the Circuit Court of Appeals (R. 589, 590), support its position, since those cases did not purport to decide specifically whether the waters impliedly reserved were reserved to the Indian tribes involved or to individual Indians. Like the *Winters* case, the *Conrad* case was a suit by the United States on behalf of an Indian tribe. The *Skeem* case, in which the United States brought suit on behalf of individual Indians, involved the interpretation of treaty provisions expressly reserving water to individual Indians occupying certain lands. The Court construed the provisions in the light of the doctrine of the *Winters* case.

The decision of the trial court and that of the court below are both based upon their view that the right to the use of waters was reserved to the individual Indians in severalty. Upon that basis those courts have concluded that when irrigable land was allotted to ~~the~~ AN Indians, somehow the several water rights became appurtenant to 40 acres of the land and passed, as an appurtenance, to any purchaser of an allotment. Manifestly, for the reasons shown, the courts erred with respect to the basis of their decisions.

THE DECREE BELOW CAN NOT BE SUSTAINED ON OTHER GROUNDS

While the court below bases its decision in favor of the defendants on the grounds set forth in Point I, *supra,* some of the language in its opinion and in that of the trial court makes it proper to point out that the decision that the plaintiff is not entitled to an injunction can not be sustained on the ground that the allotment Acts, the subsequent allotments, or the patents gave the defendants a vested right to use the waters. On the contrary, as will be shown, Congress by its subsequent enactments has given the Secretary of the Interior full control of the waters here involved, at least as far as they are needed for the Crow Irrigation Project.

a. *Congress has not granted individual interests in the use of waters of the reservation; instead, it has placed control of them under the Secretary of the Interior.*—It is elementary that the United States has plenary control of tribal property. The full measure of that control is shown in such cases as *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Gritts* v. *Fisher,* 224 U. S. 640, and *Heckman* v. *United States,* 224 U. S. 413, 444. It goes to the extent that the United States may sell unallotted lands for the benefit of the tribe contrary to the provisions of a treaty with the tribe. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566.

Under the doctrine of these cases Congress could, if it saw fit, dispose of the lands in severalty but

retain the waters for the tribe in common. The legislation subsequent to the treaty indicates that the Government has, in this instance, retained control of the water and has made provision for its use for the benefit of the tribe.

Neither the Act of April 11, 1882 (22 Stat. 42), nor the Act of February 8, 1887, which applies to Indian tribes generally, nor the allotments made thereunder, nor the subsequent patents purport to convey any water rights (R. 308, 325, 440, 459–460, 464, 466–468, 481–484, 486, 509, 516–517, 523, 525–526, 529–530, 533). Indeed, Section 7 of the General Allotment Act of February 8, 1887 (24 Stat. 388), provides—

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; * * *.

This section is a part of a general Act applying to numerous tribes and varying conditions. It does not relate solely to the circumstances of the Crow Reservation. Obviously, it is based upon the plenary power of the United States to manage and control the common tribal property for the com-

mon benefit of the tribe and, in the exercise of that power with respect to the utilization of the common water supply of any reservation required for irrigation, imposes upon the Secretary of the Interior the duty and authority to use the power for the common benefit of the resident Indians.

Question was raised below as to the extent of that control. In the first place it is to be noted that Congress was concerned with securing just and equal distribution of water among the Indians residing upon any such reservations. The accomplishment of that purpose under the diverse circumstances to which that general Act applies would require a great measure of control. Indians with land lying close to a stream might procure water with comparative ease while those who lived some distance away, particularly those of limited resources, could not. Some Indians dwell on irrigable land, others on land not susceptible to irrigation. Some might occupy lands which do not need irrigation. Presumably these facts were known to Congress and considered when the Act was passed. The power conferred must have been intended to be broad enough to accomplish its stated purpose under the evident circumstances. A power as narrowly limited as that which defendants say this section confers would be utterly inadequate. Nothing short of power to control and direct irrigation projects could procure a just distribution.

It is also obvious that an irrigation project can not be operated effectively without control of the waters necessary to the system. It is the Government's contention that this Act recognizes that the United States had full power to control the distribution of water for irrigation and directs the Secretary of the Interior to exercise that power for the United States on behalf of the Indians.

This interpretation is supported by subsequent legislative interpretations in the Acts of Congress appropriating money for the construction, maintenance, and operation of an irrigation system on the Crow Reservation, discussed, *infra,* p. 19, the first one of which was the Act of March 3, 1891, passed four years subsequent to this Act.

Therefore, it is submitted that the courts below erred in assuming that the Secretary's power was limited to prescribing "rules and regulations," and in holding that the defendants might divert waters in defiance of his control.

b. *The United States as guardian of the tribe has reserved sufficient waters for the irrigation of lands under the system of irrigation authorized by Congress.*—From the cases previously cited regarding plenary control, *supra,* it is apparent that even against the wishes of the tribe or its members, Congress would have power to dedicate waters of the reservation to the irrigation of those lands which the Secretary of the Interior should find to be irrigable. A fortiori it could do so with the consent

of the Indian tribe for whose benefit the waters were reserved. It is submitted Congress has clearly done so with respect to the waters in litigation.

If Section 7 of the Allotment Act of 1887 did not place the control of all waters of the reservations in the Secretary of the Interior, statutes passed in pursuance of an agreement with the Crow Tribe have reserved the waters in question for the lands under the system of irrigation therein provided.

More specifically, the Act of March 3, 1891 (26 Stat. 1039), authorized the construction of the Crow Irrigation Project system and made funds available therefor. Acts of March 1, 1899 (30 Stat. 947), May 31, 1900 (31 Stat. 247), and April 27, 1904 (33 Stat. 357), made further funds available for the system. By Section 31 of the Act of March 3, 1891, Congress appropriated funds "to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper * * *." The money was appropriated to be expended under his direction "for the maintenance and management of the system of irrigation provided for in this agreement [with the Crow Indians]."

Fairly construed, this Act must be regarded as (1) vesting in the Secretary of the Interior, in ad-

dition to the authority already vested in him by Section 7 of the general Act of February 8, 1887, authority to determine the lands feasible of irrigation by means of the irrigation system, since obviously such authority is necessary in order for him to be able to determine the location and extent of the ditches and canals to be constructed; (2) vesting in the Secretary of the Interior authority to take such of the waters within the Crow Indian Reservation as may be found needful for the irrigation of lands determined by him to be feasibly irrigable; and (3) dedicating waters so taken to the needs of the lands lying under the irrigation system.

Otherwise, the absurd result would obtain, as it does under the decisions of the courts below, that Congress has authorized the Secretary to construct an irrigation system but withheld from him authority over waters essential to render it beneficial and useful. The "maintenance and management of the system of irrigation provided for" was not possible without the water necessary for its operation. Since provision was made for the system and the waters necessary for the irrigation of lands under it were reserved prior to any allotments and patents to the defendants or their predecessors, their rights, if any, are subordinate to those of the system.

c. *The allotments and patents to defendants or their predecessors gave them no vested rights to water.*—Congress has not in any legislation pur-

ported to confer a right upon the individual Indians nor purported to fasten upon all irrigable lands of the Reservation, as appurtenant thereto, an equal amount, acre per acre, of the available water of the reservation, nor given authority to others to grant allottees rights which would entitle them to interfere with the control of the Secretary of the Interior over reservation waters and certainly not over those necessary for the irrigation system.

The Acts of April 11, 1882 (22 Stat. 42), February 8, 1887 (24 Stat. 388), and March 3, 1891 (26 Stat. 1040), which contained provisions looking toward allotments, did not provide that allotments should carry water rights. No reason appears why the bare allotments of irrigable lands under such allotment Acts should create water rights in the allottee when the allotments are silent with respect thereto.

Accordingly, since these Acts did not provide that allotments when made should carry water rights, and since the allotments were silent as to water rights, the patents alone remain to be examined. They also are silent as to water rights. The terminology "together with all rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging" would pass only such water rights as were already appurtenant to the land. Such language alone could not create, as appurtenances, rights not previously appurtenant to the land. As previously shown, Congress had never made them appurtenant to the land. Accordingly,

no right to water passed to an Indian allottee in severalty by the patent, and none could be transferred to a white purchaser.

It is submitted, therefore, that *all* the waters necessary for the use of the reservation had been reserved under the control of the Secretary of the Interior by the Act of 1887; that, irrespective of such reservation, sufficient water to irrigate lands within the system had been so reserved prior to the making of allotments and the issuance of patents to defendants' predecessors; and that neither the allotments nor patents have subtracted from the control of the Secretary of the Interior over the waters of the reservation or, at least, of those waters reserved for the irrigation system. Therefore any water rights which defendants may have are subject to the paramount needs of the irrigation system. The plaintiff showed that there ~~was~~ WERE not sufficient waters to irrigate the lands in use under the system (R. 403, 433, 502-503), and that it and the Indians were being irreparably injured (R. 357, 396-398, 403, 407, 410, 415, 418, 422, 423, 425, 427, 429-433, 434, 502 503). Therefore the injunction should have been granted.

II

Other Landowners in the Reservation Were Not Indispensable Parties

Wholly disregarding the theory of the bill of complaint, which sought merely a determination

whether the United States as guardian of the tribe may control waters needed for the irrigation of the lands of the reservation, the District Court acceded to the request of the defendants for a determination entitling them to a pro rata per acre share of the water and treated the suit as one for an adjudication of water rights (R. 316–317). The Circuit Court of Appeals treated the suit in the same manner and directed the dismissal, without prejudice, of the bill and the counterclaim, indicating that affirmative relief could not be granted because of nonjoinder of all landowners within the reservation, whom it regarded as necessary parties (R. 590–591). But it is the position of the Government that the suit is not one for an adjudication of water rights and that the bill should not have been dismissed for defect of parties, whatever action may have been appropriate with respect to the counterclaims.

The action was for an injunction, not for an adjudication of water rights. The bill of complaint required the District Court and the Circuit Court of Appeals to determine (a) whether the United States as guardian of the Indians might control, to the exclusion of the defendants, all waters needed for the lands within the project, and (b) whether the limited supply of water was needed for such lands. An affirmative answer to these questions should have resulted in the granting of the injunctive relief sought. It was error for the courts below

to depart from the theory of the bill of complaint and treat the suit as the usual water suit requiring determination of amounts of water to which the defendants, as between all users, might be entitled.

It may be true that all the landowners would be necessary parties to the action on the cross bills, but, since the bill of complaint does not require adjudication of water rights, all landowners within the reservation are neither necessary nor indispensable parties in order to grant the relief sought by the Government. The court below has cited no authorities to support its position.

It is true that cases may be found, in which rights in water are the subject of controversy and which are not suits for the adjudication of a stream, in which absent parties are held necessary or even indispensable parties to the suit. Cf. *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, 160–161; *Veitia* v. *Fortuna Estates* (C. C. A. 1st), 240 Fed. 256, 261; *American Falls Reservoir District No. 2* v. *Crandall* (C. C. A. 9th), 82 F. (2d) 973, 978. But in these cases the decree sought, if granted, would have operated directly to deprive the absent parties of an amount of water to which they were entitled or the rights of the parties to the suit would be adversely affected by the absence of such parties.

In the present case, however—where (1) landowners within the reservation other than the defendants will not be affected by the operation of the

decree sought, since the decree will not serve to cut down their supply of water, (2) the defendants will not be adversely affected in establishing their rights by the absence of other landowners, and (3) if the decree goes against them, they will be subjected to no liability to the other landowners by reason thereof—such landowners are neither necessary nor indispensable parties to the suit. The fact that a decision in favor of the plaintiff will serve as a precedent in suits against other landowners interfering with the control of the Secretary of the Interior will not in itself make those landowners indispensable parties.

Clearly, with reference to the issues raised in the bill of complaint, the conclusion of the court below that "such a determination would directly and materially affect all owners of land within the reservation" (R. 590) was erroneous—unless it was referring to the cross bills which, of course, do not affect the Government's position here.

Moreover, if all landowners within the reservation are necessary parties, then logically, all parties using the stream in question off the reservation, would also be necessary parties. For example, all water users along Pass Creek, a stream arising in Wyoming and emptying in the Little Big Horn River in Montana (R. 379) should be joined. But the United States, where its bill of complaint was never framed for an adjudication of water rights, may not be required to assume the burden of bring-

ing into the suit a multplicity of parties or of maintaining an interstate suit.

IMPORTANCE OF THE ISSUES HEREIN

Approximately $2,000,000.00 of tribal and public funds has been expended on the Crow Irrigation Project (R. 352). In addition, more than $50,000,000.00 has been invested in irrigation projects constructed and maintained by the Government on other Indian reservations in the arid States. Thousands of acres of lands are susceptible of irrigation on these reservations, while the total available water supply is wholly inadequate to irrigate all of them. Moreover, under the rulings of the courts below each acre is entitled to a pro rata share of the available waters, while as a matter of obvious fact thousands of additional acres of reservation lands cannot be economically irrigated. For example, in the present case it is manifest that the distribution of the limited supply of waters for such a vast acreage on the pro rata basis sanctioned by the courts below would result in an utter waste of water since none of the lands would receive enough waters to justify their cultivation.

Furthermore, if the decrees of the courts below are permitted to stand, a multiplicity of suits with a multiplicity of parties will inevitably follow between the United States and the thousands of allottees and patentees and their successors owning lands irrigated by Indian waters. All practicable

ontrol over these private diverters by the Secre-
ary of the Interior will have been removed.

The magnitude of the interests involved and the
ature of the rights asserted, therefore, fully war-
ant a review by this Court of the questions in-
olved so that correct principles may be applied in
his and future cases.

Wherefore, it is respectfully submitted that this
etition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE 1938.

APPENDIX

The pertinent articles of the Treaty of May 7, 1868, 15 Stat. 649, are:

> ARTICLE II. The United States agrees that the following district of country, to wit: * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.
>
> ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within

said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow Land Book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

The pertinent parts of the Act of April 11, 1882, c. 74, 22 Stat. 42, are—

> First. That the Government of the United States cause the agricultural lands remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions hereinafter mentioned, and to issue patents to us respectively, therefor, so soon as the necessary laws are passed by Congress. Allotments in severalty of said surveyed lands shall be made as follows:
>
> To each head of a family not more than one quarter-section, with an additional quantity of grazing land not exceeding one quarter-section.
>
> To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.
>
> To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and
>
> To each other person under eighteen years, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.
>
> All allotments to be made with the advice of our agent, or such other person as the Secretary of the Interior may designate for that purpose upon our selection, heads of families selecting for their minor children, and the agent making the allotment for each orphan child. The title to be acquired by us, and by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court,

nor subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President may see fit to remove the restriction, which shall be incorporated in each patent.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed a sufficient quantity of land on the Crow Reservation to secure the settlement in severalty of said Indians as provided in said agreement, and upon the completion of said survey he shall cause allotments of land to be made to each and all of the Indians of said Crow tribe in quantity and character as mentioned and set forth in the agreement above named, and upon the approval of said allotments by the Secretary of the Interior he shall cause patents to issue to each and every allottee for the lands so allotted, with the same considerations, restrictions, and limitations mentioned therein as are provided in said agreement.

The Act of February 8, 1887, c. 119 (24 Stat. 388) is in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is

advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected

by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set part and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it

shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom

such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occuping any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among

the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

The pertinent part of the Act of March 3, 1891, 543, 26 Stat. 1040, is—

That in consideration of the cession of territory herein made by us as individual Indians and heads of families of the Crow tribe to the Government of the United States, the said Government of the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, hereby agrees to pay the sum of nine hundred and forty-six thousand dollars lawful money of the United States, in the manner hereinafter described:

First. That of the above-named sum there is hereby appropriated and set apart two hundred thousand dollars to be expended under the direction of the Secretary of the Interior in the building of dams, canals, ditches, and laterals for the purposes of irrigation in the valleys of the Big Horn and the Little Big Horn Rivers and on Pryor Creek and such other streams as the Secretary of the Interior may deem proper: *Provided,* That not to exceed fifty thousand dollars shall be expended annually in performing this work: *And provided further,* That the superintendent in charge of said works shall, in the employment of laborers, be required to give preference to such Indians of the Crow tribe as are competent and willing to work at the average wages paid to common laborers for the same kind of work,

and the labor so employed shall be paid
cash.

That the sum of seventy-five thousand dol
lars is hereby appropriated and set
as an irrigating fund, to be expended
the direction of the Secretary of the Int
for the maintenance and management
system of irrigation provided for in
agreement.

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